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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RONALD AUSTIN, Plaintiff and Appellant, v. MUNICH RE AMERICA CORPORATION et al., Defendants and Respondents.	E069428 (Super.Ct.No. CIVDS1711217) OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis, Judge. Affirmed in part and reversed in part with directions.

Ronald Austin, in pro. per.; and Brent J. Borchert for Plaintiff and Appellant.

Robins Kaplan, William A. Webster, Ryan W. Marth, and Kelvin D. Collado for Defendants and Respondents.

I. INTRODUCTION

Plaintiff and appellant, Ronald Austin, brought this action based on his purchase of solar panels from LDK Solar Tech USA, Inc. (LDK). The solar panels allegedly came

with a performance warranty. Defendants and respondents, Munich Re America Corporation and Munich Reinsurance America, Inc. (collectively, Munich), allegedly insured LDK's performance warranties. After Austin's solar panels failed to perform as guaranteed, Austin sued Munich under a number of contract- and warranty-based theories, as well as under several statutory schemes. (LDK is also a defendant but is not a party to this appeal.) Munich demurred to all 12 causes of action in the first amended complaint (FAC), and the trial court sustained it in part and overruled it in part. Austin then sought a judgment of dismissal so that he could seek immediate review of the court's ruling.

Austin primarily contends that the court erred in rejecting his allegations of third party beneficiary standing. We agree with Austin that he has sufficiently alleged he is a third party beneficiary of the insurance contract between LDK and Munich and he may therefore sue to enforce it. As a result, his causes of action for breach of the insurance contract, breach of the covenant of good faith and fair dealing implied in that contract, and declaratory relief survive. We thus reverse the court's ruling sustaining the demurrer to these causes of action. The court's ruling on the demurrer was correct as to all the other causes of action, and we thus affirm it as to those causes of action.

II. FACTS AND PROCEDURE

A. *The FAC*

For purposes of a demurrer, we accept the properly pleaded facts as true. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The FAC alleges as follows:

LDK made and sold photovoltaic solar panel modules. In March 2010, Munich issued a press release stating that its "new insurance solution" would cover the performance warranty of LDK's solar panels. Austin attached the press release to the FAC. Among other things, the press release states: "The insurance solution covers the performance warranty of LDK Solar modules for a period of 25 years. . . . [¶] The cover offers LDK Solar a greater degree of business certainty and thus constitutes a powerful differentiator in a competitive marketplace. Ultimately it gives operators of solar parks additional economic security in the event of an unforeseen loss in performance of the modules. This new insurance solution is a major stepping-stone in financing photovoltaic projects as it provides additional financial security."

Austin purchased 40 solar panel modules from LDK in November 2014. They came with a warranty guaranteeing that they would perform at no less than 94 percent of advertised output in the first five years. If the modules failed to perform as warranted solely because of defects in materials or workmanship, LDK would replace the modules, provide additional modules to make up for the loss of output, or provide economic compensation. Austin also attached the performance warranty to the FAC.

In the months preceding his purchase, Austin substantially researched the performance warranty and relied heavily on the March 2010 press release and other advertising from Munich stating that it was insuring the performance of the product. LDK and Munich "entered into an insurance contract expressly intended to benefit Austin

and other similarly situated purchasers" of LDK's solar panels. As such, Austin is a third party beneficiary of the contract.

Unbeknownst to Austin, LDK collapsed into bankruptcy around 2015. In May 2017, Austin tested each of his LDK solar panels and found that 10 of them did not output at least 94 percent of their guaranteed capacity. He attempted to file a claim under the performance warranty with both LDK and Munich, but received no response from either. He then filed the instant lawsuit against LDK and Munich.

As against Munich, the FAC alleges 12 causes of action for breach of express contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, intentional misrepresentation, negligent misrepresentation, breach of an express warranty, breach of an implied warranty, breach of warranty under the Song-Beverly Consumer Warranty Act (Song-Beverly Act) (Civ. Code, § 1790 et seq.), violations of the unfair competition law (Bus. & Prof. Code, § 17200) and false advertising law (Bus. & Prof. Code, § 17500), violations of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and declaratory relief.[1]

B. *Munich's Demurrer*

Munich demurred to all 12 causes of action. As to all causes of action, it argued that Austin could not state a claim directly against Munich (the insurer) because he did

[1] The FAC styles the first cause of action "breach of contract," not breach of express contract. (Capitalization and bolding omitted.) But because Austin alleges a separate cause of action for breach of *implied* contract, we use the term "express" to differentiate between the two causes of action.

not allege he was an insured under LDK's policy. With respect to breach of express and implied contract and breach of the implied covenant, Munich contended that Austin had not alleged the formation of a contract between him and Munich. As to the warranty and Song-Beverly Act causes of action, Munich asserted these claims could relate only to goods, and insurance was not a good. It moreover argued that there was "no contract between Plaintiff and Munich . . . for an express warranty to be created in the contract itself."

The court sustained the demurrer to the causes of action for breach of express contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, breach of express warranty, breach of implied warranty, violations of the Song-Beverly Act, and declaratory relief.[2] The court gave Austin leave to amend these causes of action. As to the remaining causes of action—for intentional and negligent misrepresentation and violations of the unfair competition and false advertising laws—the court overruled the demurrer.

The court reasoned that Austin had entered into a contract with LDK when he purchased the solar panels, but Munich was not a party to that contract, and Austin could not therefore sue Munich for breach of an express or implied contract, or breach of the

[2] The court also impliedly sustained the demurrer on the CLRA cause of action, explaining that Austin had "withdrawn" this claim. In his opposition to the demurrer, Austin conceded that he could not state a CLRA claim and that the court should sustain the demurrer to this cause of action without leave to amend.

implied covenant of good faith and fair dealing. As to Austin's allegations that he was a third party beneficiary, the court concluded he "was, in fact, a party to the contract with LDK and being a party to that contract he cannot simultaneously be a third-party beneficiary thereof." Similarly, with respect to the breach of express and implied warranty causes of action, the court held they required a privity of contract between the parties, and there was no privity of contract between Austin and Munich. The court rejected the cause of action under the Song-Beverly Act because there was no buyer-seller relationship between Austin and Munich. Finally, it rejected the declaratory relief cause of action because it was "unnecessary and superfluous since the issues that are involved in the other causes of action are going to be the issues that the determination of which will fully resolve all of the disputes between the parties."

Although several causes of action survived the demurrer, Austin requested that the court dismiss his case in its entirety so that he could immediately appeal the court's ruling. (E.g., *Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790, 793 [allowing an appeal from a judgment of dismissal because the request for dismissal was "not really voluntary, but only done to expedite an appeal" after an adverse ruling on the defendant's demurrer].) The court granted his request and entered a judgment of dismissal.

III. STANDARD OF REVIEW

We review a complaint independently to determine whether it alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of California, Inc.* (2001) 25

Cal.4th 412, 415.) As noted, we accept all properly pleaded material facts, but not contentions, deductions, or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) "We do not assess the credibility of the allegations, as '"[i]t is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue."'" (*Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 375.) Moreover, "the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern" us, and the "plaintiff need only plead facts showing that he [or she] may be entitled to some relief . . . ." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.)

IV. DISCUSSION

Austin argues the court erred in concluding that he could not sue Munich as a third party beneficiary of the insurance contract between LDK and Munich. We agree with Austin partially. His allegations of third party beneficiary standing are sufficient to save his causes of action for breach of express contract and breach of the implied covenant of good faith and fair dealing. He bases these causes of action on a breach of the alleged insurance contract between LDK and Munich. The court did not err, however, in sustaining the demurrer to the breach of implied contract and warranty causes of action. Even if Austin is a third party beneficiary of the insurance contract, he has not sufficiently alleged Munich's liability under these other causes of action. As to the

declaratory relief cause of action, Austin has sufficiently alleged an actual controversy with Munich.

A. *Breach of Express Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing*

Austin alleges Munich breached the insurance contract between it and LDK and the covenant of good faith and fair dealing implied in the contract. He argues he has sufficiently alleged that he is a third party beneficiary of this contract and may therefore sue to enforce it. We agree with respect to these two causes of action.

Generally, people have no standing to enforce contracts to which they are not parties. (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1722.) Third party beneficiaries of contracts are an exception. "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Civ. Code, § 1559; *Mercury Casualty Co. v. Maloney* (2003) 113 Cal.App.4th 799, 802.) While the contract need not name or individually identify the person to be benefited, the terms of the contract must expressly evince an intent to benefit the third party or a class of people to which the third party belongs. (*Harper v. Wausau Ins. Corp.* (1997) 56 Cal.App.4th 1079, 1086-1087; *InfiNet Marketing Services, Inc. v. American Motorist Ins. Co.* (2007) 150 Cal.App.4th 168, 177.) People who are only incidentally or remotely benefitted by a contract may not enforce it as third party beneficiaries. (*Harper v. Wausau Ins. Corp.*, *supra*, at p. 1087.) "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves

construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." (*Jones v. Aetna Casualty & Surety Co.*, *supra*, 26 Cal.App.4th at p. 1725.)

These traditional contract principles apply in the insurance context. A third party beneficiary of an insurance policy may sue the insurance company to enforce the terms of the policy intended to benefit that third party. (*Harper v. Wausau Ins. Corp.*, *supra*, 56 Cal.App.4th at p. 1087.) In *Harper*, for instance, the plaintiff was injured in a slip and fall and sued the property owner's insurance company for failure to pay her medical expenses. (*Id.* at p. 1083.) She alleged that she was a third party beneficiary of the insurance contract between the property owner and the insurance company. (*Ibid.*) After evaluating the language of the insurance policy, the court held the plaintiff was an intended third party beneficiary of the policy's "medical payment provision" and had a right to enforce it. (*Id.* at pp. 1090-1091.) The rights of third party beneficiaries to enforce policies may extend to covenants implied in policies, such as the implied covenant of good faith and fair dealing, where such covenants are for their benefit. (*Northwestern Mut. Ins. Co. v. Farmers' Ins. Group* (1978) 76 Cal.App.3d 1031, 1042-1043.)

Austin has adequately alleged his standing as a third party beneficiary to recover for breach of contract and breach of the implied covenant of good faith and fair dealing. "In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG*

Specialty Ins. Co. (2002) 29 Cal.4th 189, 198-199.) According to a fair reading of the FAC, Munich and LDK entered into an insurance agreement whereby Munich agreed to cover the performance warranty of LDK's solar panels for 25 years. And, by so insuring the performance warranty, the contracting parties allegedly intended to benefit Austin and similarly situated purchasers of LDK's solar panels. Munich represented in its press release that its "insurance solution" gave operators of solar parks—that is, purchasers of LDK's solar panels—"additional economic security in the event of an unforeseen loss in performance of the modules." This was sufficient to allege third party beneficiary standing, or a contract made expressly for Austin's benefit. (Civ. Code, § 1559; *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.* (1958) 160 Cal.App.2d 290, 300, fn. 3.)

Whether Austin "can prove these allegations . . . remains to be seen" (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.*, *supra*, 29 Cal.4th at p. 199), but we are not concerned with difficulties of proof at this stage (*Alcorn v. Anbro Engineering, Inc.*, *supra*, 2 Cal.3d at p. 496). His purported lack of standing is not a defect that is evident on the face of the complaint. An ultimate determination of his third party beneficiary status must await an examination of the insurance policy's language and the circumstances surrounding its execution.[3] (*Jones v. Aetna Casualty & Surety Co.*, *supra*, 26 Cal.App.4th at p. 1725.) The pertinent evidence simply is not before us, and

[3] Austin indicates that he does not have the insurance policy because it "has yet to be produced in discovery by any defendant."

we therefore cannot say Austin lacks third party beneficiary standing as a matter of law. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.*, *supra*, 29 Cal.4th at pp. 193, 198-199 [declining to interpret an alleged insurance policy at the demurrer stage because the precise terms of the policy were not before the court, and explaining the defendant could renew its demurrer arguments in later motions, when the court could consider a copy of the policy].)

The trial court did not reject Austin's third party beneficiary theory based on a reading of the policy language or the surrounding circumstances. Instead, it arrived at its conclusion because Austin "was . . . a party to the contract with LDK and being a party to that contract he cannot simultaneously be a third-party beneficiary thereof." But the court did not reasonably interpret the FAC. Austin alleges the existence of two pertinent agreements in the FAC—the warranty agreement between him and LDK and the insurance agreement between LDK and Munich. He alleges that he was a party to the warranty agreement but a third party beneficiary of the insurance agreement, not that he was both a party to the warranty and a third party beneficiary of it.

On appeal, Munich suggests that Austin had to allege facts showing the contracting parties intended to benefit him in particular, not just a class of people to which he belongs. Munich also asserts the press release "does not on its face or through any extraneous fact indicate an intention to benefit Austin." First, Munich starts from an incorrect premise. It is well settled that the contract need only show an intent to benefit a class of people to which the third party belongs, and the contract need not specially

identify the third party. (E.g., *Otay Land Co., LLC v. U.E. Limited, L.P.* (2017) 15 Cal.App.5th 806, 855; *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1023; *InfiNet Marketing Services, Inc. v. American Motorist Ins. Co.*, *supra*, 150 Cal.App.4th at p. 177; *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1773; *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.*, *supra*, 160 Cal.App.2d at p. 297.) Second, we do not construe the complaint as alleging that the press release alone gives rise to Austin's third party beneficiary standing. Rather, the FAC alleges the agreement to insure LDK's performance warranties gives rise to his standing. Depending on whether the language of the insurance policy is ambiguous, the press release may have some bearing on the intent to benefit purchasers of the product, if it constitutes evidence of circumstances surrounding the policy's execution. But these are all evidentiary issues that are not appropriate for resolution at this point.

In sum, the court should have overruled Munich's demurrer to the causes of action for breach of express contract and breach of the implied covenant of good faith and fair dealing. Austin adequately alleges that he is a third party beneficiary of a contract between Munich and LDK.

B. *Breach of Implied Contract*

Austin's cause of action for breach of implied contract is a different matter. As to this, the court correctly sustained the demurrer. The implied contract underlying this claim is allegedly one between Munich and Austin. But as Munich argued in its

demurrer, the FAC does not sufficiently allege the formation of an implied-in-fact contract between Munich and Austin.

"An implied contract is one, the existence and terms of which are manifested by conduct." (Civ. Code, § 1621.) The essential elements of any contract include consideration and the contracting parties' mutual consent. (Civ. Code, §§ 1550, 1565.) "Consideration is present when the promisee confers a benefit or suffers a prejudice." (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1165.) "The manifestation of mutual consent is generally achieved through the process of offer and acceptance." (*DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800, 813.) The "acceptance of an offer must be communicated to the offeror to become effective." (*Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 491.) "Mutual consent necessary to the formation of a contract 'is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.'" (*DeLeon v. Verizon Wireless, LLC*, *supra*, at p. 813.)

Austin's allegations do not amount to an implied contract under these principles. The FAC alleges Munich's "action of publishing a press release" was "intended as an offer" to make purchasers of LDK's solar panels third party beneficiaries of the insurance contract between LDK and Munich. The FAC further alleges that, upon Austin's purchase of the solar panels, he and Munich entered into the implied contract. We have serious doubts about whether Munich's press release may be objectively and reasonably

construed as an offer to contract directly with LDK's customers. But we will assume for the sake of argument that the press release announcing the insurance contract between Munich and LDK constituted an offer to contract separately with LDK's customers. Even so, Austin has not pled an effective acceptance of the purported offer. The alleged acceptance appears to be his purchase of the solar panels. That was a transaction with LDK, who was not the offeror under Austin's implied contract theory. There are no allegations that Austin communicated his acceptance to Munich, the alleged offeror. And without an effective acceptance, there was no mutual consent to contract.

Perhaps more problematically, there are no allegations of sufficient consideration for the implied contract. Austin must have conferred a benefit or suffered a prejudice in exchange for Munich's promise. But his payment of money to LDK was consideration for the solar panels and LDK's separate warranty promises to him. LDK's payment of insurance premiums to Munich was consideration for Munich's obligations to LDK under the alleged insurance contract between them. None of the FAC's allegations shows consideration flowing from *Austin to Munich* for a separate promise between these two parties.

Fundamentally, Austin has confused third party beneficiary standing with an actual contract. "[A] third party beneficiary's rights under the contract are not based on the existence of an actual contractual relationship between the parties but on the law's recognition that the acts of the contracting parties created a duty and established privity between the promisor and the third party beneficiary . . . ." (*Mercury Casualty Co. v.*

Maloney, *supra*, 113 Cal.App.4th at p. 802, italics omitted.) As we have discussed, the press release may be evidence of Munich's and/or LDK's intent to benefit purchasers by entering into the insurance contract. However, the press release itself did not give rise to a contract between Munich and purchasers, at least as alleged.

Because of these defects, the court properly sustained the demurrer to the cause of action for breach of implied contract. Although the court gave Austin leave to amend, he declined to amend any cause of action and instead pursued an immediate appeal. "'It is the rule that when a plaintiff is given the opportunity to amend his complaint and elects not to do so, strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can.'" (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.) In any event, Austin has not explained how he might rehabilitate this cause of action, and it is his burden to show a reasonable possibility of curing defects in the FAC. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 319.) We shall therefore direct the court to sustain the demurrer to this cause of action without leave to amend.

C. *Breach of Express and Implied Warranty and Breach Under the Song-Beverly Act*

Austin bases his warranty causes of action on the express performance warranty and the implied warranty of merchantability that came with his purchase of LDK's solar panels. He suggests that his third party beneficiary standing permits him to proceed against Munich for breaching the express and implied warranties. We disagree. LDK and Austin are parties to the warranties, but not Munich.

A warranty is a contract concerning some aspect of a sale of goods. (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1168.) Under the Uniform Commercial Code, express warranties are created by the seller's affirmations of fact or promise relating to the goods, the seller's description of the goods, or any samples or models of the goods that are made part of the basis of the bargain. (U. Com. Code, §§ 1101, 2313, subd. (1).) The implied warranty of merchantability is implied in the contract for sale of the goods, so long as the seller is a merchant with respect to goods of that kind. (U. Com. Code, § 2314, subd. (1).) Generally, an action for breach of express or implied warranty requires a privity of contract between the plaintiff and the defendant. (*Burr v. Sherwin Williams* Co. (1954) 42 Cal.2d 682, 695.) When the face of the complaint discloses a lack of privity, the court properly sustains a demurrer. (*Windham at Carmel Mountain Ranch Assn. v. Superior Court*, *supra*, at p. 1168.)

This is the case here, where Munich was not the seller or manufacturer of the solar panels. The FAC discloses that LDK made the solar panels, LDK sold them to Austin, and LDK expressly warranted the performance of its product. The privity of contract for purposes of the express and implied warranties thus runs between LDK and Austin. Munich cannot be liable for breaching a warranty to which it is not a party.

The same is true with respect to the Song-Beverly Act cause of action. The Legislature enacted the Song-Beverly Act as a remedial measure, intended to protect consumers. (*Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 915.) It

"""regulates warranty terms, imposes service and repair obligations on manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and *broadens a buyer's remedies to include costs, attorney's fees, and civil penalties*. [Citations.] *It supplements, rather than supersedes, the provisions of the California Uniform Commercial Code*."""" (*Id.* at p. 926.) An express warranty under the Song-Beverly Act is "[a] written statement arising out of a sale to the consumer of a consumer good pursuant to which *the manufacturer, distributor, or retailer* undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance . . . ." (Civ. Code, § 1791.2, subd. (a)(1), italics added.) As to implied warranties under the Song-Beverly Act, "every sale of consumer goods that are sold at retail in this state shall be accompanied by the *manufacturer's and the retail seller's* implied warranty that the goods are merchantable." (Civ. Code, § 1792, italics added.) The FAC discloses that Munich was not the manufacturer, distributor, or retail seller of LDK's solar panels. It cannot therefore be liable for breaching warranties it never provided.

Austin also declined to amend these warranty causes of action, and we presume he has stated as strong a case as he can. (*Reynolds v. Bement, supra,* 36 Cal.4th at p. 1091.) We shall direct the court to sustain the demurrer to these causes of action without leave to amend.

D. *Declaratory Relief Cause of Action*

Austin's cause of action for declaratory relief seeks a determination of the contractual rights and obligations between him and Munich. Insofar as the court sustained the demurrer to his contract-based causes of action, it ruled the declaratory relief cause of action was "unnecessary and superfluous." Given that we are reversing the ruling with respect to breach of express contract and the implied covenant, Austin has alleged an "actual controversy relating to the legal rights and duties" of the parties under the insurance contract. (Code Civ. Proc., § 1060.) This is all that is required in terms of pleading a declaratory relief action. (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) We will direct the court to overrule the demurrer to this cause of action.

V. DISPOSITION

The judgment of dismissal is reversed. We also reverse the trial court's ruling sustaining the demurrer to the causes of action for (1) breach of express contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) declaratory relief. The court shall overrule the demurrer to these causes of action.

We affirm the trial court's ruling sustaining the demurrer to the causes of action for (1) breach of implied contract, (2) breach of express warranty, (3) breach of implied warranty, (4) violation of the Song-Beverly Act, and (5) violation of the CLRA, except that on remand, Austin shall not have leave to amend these causes of action. We also affirm the court's ruling overruling the demurrer to the causes of action for (1) intentional

misrepresentation, (2) negligent misrepresentation, (3) violation of the unfair competition law, and (4) violation of the false advertising law. Each party shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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FIELDS
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.